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The Texas Miracle: Racial Discrimination Alive and Well Sixty Years after *Brown*

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Abstract

The purpose of this study is to determine whether or not and how race plays a role in the funding of Texas public school districts. Beyond these determinations, we explore the legal implications that would come from evidence of a discriminatory funding system, specifically in light of Title VI of the Civil Rights Act. In this study, we use both quantitative and legal analysis. We explore population-level data containing information on the funding and racial composition of all Texas public school districts. Descriptive methods such as cross-tabulations were paired with correlation and measures of effect size to explore the relationship between race and school district funding. In our legal analysis, we review relevant legal statutes and case law, situating our quantitative findings within the larger, school finance jurisprudence context.

Keywords: school finance, equity, race, Title VI

Much is required from those to whom much is given, for their responsibility is greater.
—Luke 12:48

With great power there must also come -- great responsibility!
—Stan Lee, Amazing Fantasy #15 (Introducing Spider Man)

The State of Texas has often been at the epicenter of struggles involving education and race. As early as 1876, the Texas Constitution required the state legislature to provide education for racial minorities, a commitment the legislature sought to bring to fruition (Lane, 1891). But the early promise of education for all was for many years simply that, a promise. Over time, Texas has sought to overcome a number of obstacles to make that promise a reality.

Texas first attained national prominence on the issue of race and education with the University of Texas' refusal to admit Heman Sweatt—a Black man—to The University of Texas Law School. Sweatt and the NAACP brought suit, leading to the 1950 *Sweatt v. Painter* decision in which the United States Supreme Court held that, under the Equal Protection Clause of the Fourteenth Amendment, a state could not provide separate law schools for students of different races even if those law schools were "substantially equal." The *Sweatt* decision laid the foundation for the "separate but equal" decision in *Brown v. Board of Education* in 1954 (Gasman, 2007). Sixty-seven years later, a Texas institution again found itself under scrutiny regarding race and education in a different context, as *Fisher v. University of Texas* (2013) brought the University of Texas before the Supreme Court to defend its admissions policy in which racial diversity is one factor that can be considered as a part of the admissions process. The evolution of higher education policy and race is not the only area of education in which Texas has played a visible role.

Given its influence on the textbook market (Robelen, 2010) and its pioneer status with regards to high-stakes testing (Carnoy & Loeb, 2002; Heilig & Darling-Hammond, 2008), some might say that in public K-12 education, "as Texas goes, so goes the nation." For example, many lament the impact Texas' decisions with regards to text books have on the rest of the nation (Collins, 2012). Texas led more positively in being the first state to provide bilingual education in public schools[i] (H.B. 103, 1969). Due to its size and influence, Texas has the power to drive the direction of education in America, for better or worse.

On the positive side of the equation, claims have been made that Texas' approach to public education has led to great advances in the quality of education in the state. Dubbed "The Texas Miracle", politicians have taken credit for these gains, and the media has touted Texas as an example of how public education should be managed by state governments (Haney, 2001). As will be argued and evidenced in subsequent sections of this paper, an historical argument can be made that in the field of public school funding, Texas has miserably failed to lead, despite the fact that those negatively impacted by that failed leadership have fought for equity every step of the way. The data show that this failure of Texas' leadership has not only negatively impacted the quality of education in the state, but that the negative impact continues to be disparately felt by racial minorities. Put plainly, Texas' school funding scheme is biased against students of color.

From an historical perspective, school funding in Texas evolved as in many other states. Texas initially funded public education by administering flat grants. This was followed by the establishment of a foundation program under the terms of which districts received funding from the state, provided that they also implemented local property taxes to fund education (Sutton, 2008). Yet, because a significant proportion of school funding was based on property taxes and, therefore, local property values, the court cases below highlight how school funding was not (and is not) equal or equitable. As a result, disputes over school funding have been an area of active litigation in Texas for almost 50 years.

The first Texas public school funding lawsuit, filed in 1968, was *San Antonio Independent School District v. Rodriguez* (1973), a lawsuit that made two claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution: (1) that education was a fundamental right; and (2) that wealth (poverty) was a suspect class (p. 16). The case put Texas in the national limelight as it made its way to the United States Supreme Court. In *Rodriguez*, the U.S. Supreme Court held that under the Federal Constitution there is no fundamental right to education (p. 35), and that the class defined as "poor" is not a protected class (p. 29). The ruling essentially closed the door of federal courthouses to litigants seeking equity in state funding for education. Beyond the legal outcome, probably the most significant impact of *Rodriguez* on school funding litigation was to shift the focus of those seeking equity in school funding away from claims under federal law and towards claims that specific funding schemes violated state constitutions (Sutton, 2008).

In Texas, this shift resulted in multiple rounds of litigation based on claimed violations of the Texas Constitution. On three separate occasions, the Texas Supreme Court has found that the Texas school finance system is unconstitutional (*Edgewood ISD v. Kirby*, 1989/1991; *Carrollton-Farmers Branch ISD v. Edgewood*, 1992). A fourth case is in process (on appeal), with the state funding system yet again having been found by the District Court to be in violation of the Texas Constitution. Thus, while the battle for educational equality has been raging in Texas for over 60 years, there have been small gains, but no final victory.

The Texas public school finance system, known as the Foundation School Program (FSP), is overseen by the Texas Education Agency and "determines the amount of state and local funding due to school districts" (Texas Education Agency, 2013, p. 7). Further, and of particular relevance to the present study, the Foundation School Program (1995) is required, by law, to "adhere to a standard of neutrality" and provide districts "equal access to similar revenue per student." The attempt to provide this equal access is done through a mechanism known as *recapture*, which redistributes some of the property tax dollars of property rich districts. This redistribution element of the FSP is colloquially known as *Robin Hood* (Alemán, 2006; Hoxby & Kuziemko, 2004).

The focus of Texas public school funding litigation (and all other states' school funding litigation) since the 1973 *Rodriguez* decision has been on state constitutional violations—which is logical in light of the Supreme Court's ruling that essentially foreclosed federal constitutional remedies. However, given the significant demographic shifts in Texas' population and the massive amount of federal funding of education, we asked ourselves whether the facts may now be such that the current Texas school-funding scheme may violate federal law—specifically Title VI of the Civil Rights Act. Federal funding of Texas education matters legally because, while there is no *per se* federal right to education, Title VI creates a federally enforceable right to non-discrimination in educational programs that receive federal funds. Title VI ensures that no citizen is denied the benefits of any federally funded program on the basis of race (Civil Rights Act of 1964).

We focus on Title VI for two reasons. First, given the growth in population of people of color in Texas (Jervis, 2011), we wondered whether discrimination in school funding on the basis of race might be more obvious in the data now than in the past. Second, in 1968, when *Rodriguez* was filed—total federal spending on K-12 education was approximately $2.5 billion (U.S. Office of Management and Budget, 2013). In 2010, that number reached a high of over $73 billion. While the amount of federal spending is not an element of Title VI, federal spending at these levels, and the fervent interest in education of presidential administrations over the last decade, hinted to us at a potential willingness for the Office for Civil Rights to review the issue of education funding and Title VI more thoroughly if the facts so demanded. Indeed, almost 20 years ago on the 30th anniversary of the enactment of Title VI, the United States Attorney General directed Federal Departments and Agencies to "ensure that the disparate impact provisions in [their] regulations are fully utilized so that all persons may enjoy equally the benefits of Federally financed programs" (Office of the Attorney General, 1994, para. 2). The Attorney General emphasized: "Facially neutral policies and practices that act as arbitrary and unnecessary barriers to equal opportunity must end. This was the goal of Title VI when it became law and it remains one of the highest priorities of this Administration" (para. 4).

We begin our analysis of Texas public school funding and Title VI by examining Texas' allocation of education funds to public schools to determine whether there are any differences in amounts provided to school districts and to individual children based on race. The key research questions are:

1) Is there a relationship between the racial composition of school districts and the revenues they receive through the Foundation School Program? And if so …
2) What is the difference between the average revenue allotted to White students and that allotted to students of color?
3) How large is the gap in funding between White students and students of color?

Having found that there is indeed a statistically significant difference in fund allocations based on race (as asked in the first research question), we then turn to an analysis of whether the disparities violate Title VI. We analyze Title VI ramifications on two levels: (1) whether the Texas school finance system as a whole violates the *disparate impact* protections of Title VI; and (2) whether there are opportunities on a case–by–case basis for individual Texas school districts to make claims under Title VI.[ii]

Data

The data used for this study were obtained from the Texas Education Agency (TEA) through a public information request. The data, which contain school finance figures for the 2011-2012 school year, represent the most up to date information available to us at the time of writing. During that year, there were 1,226 unique school districts across the state, with a total enrollment of 4,977,705 students - 13.3% of whom were recorded as African American, 44.0% as Hispanic, 37.0% as White, 3.6% as Asian. The remaining 1.9% of students were categorized as American Indian (0.5%), Pacific Islander (0.1%), or two or more races (1.4%).

TEA annually releases information through the Academic Excellence Indicator System (AEIS) containing a variety of information about all campuses and school districts in the state. From AEIS, we obtained enrollment information aggregated at the district level that contained overall enrollment, along with the number and percentage of enrolled students categorized as White. The enrollment data was then merged with finance data. The finance data lists the total revenue obtained by each district through the Foundation School Program, as a measure of per-pupil revenue – the total revenue a district receives divided by its total enrollment. Table 1 contains summary statistics and provides a visual representation for the revenue per pupil variable. As evidenced in Table 1, the maximum value is much further from the mean than the minimum value; therefore the distribution of the revenue per pupil variable is positively skewed, indicating the vast wealth possessed by some of the more property-rich districts.

Table 1[iii]
Summary Statistics - District Revenue Per Pupil

Measure	Value
Range	$3,177.00 - $40,647.00
Mean	$9,143.00
Median	$8,395.50
Standard Deviation	$3,116.2

Figure 1 below, is a histogram charting the proportional distribution of districts receiving various levels of revenue per pupil. A histogram containing all observations does not readily lend itself to clear interpretation, therefore only the observations within two standard deviations of the mean are included in the histogram (over 96% of all districts). As can be seen in Figure 1, the majority of districts are huddled around the $8,000 per pupil area.

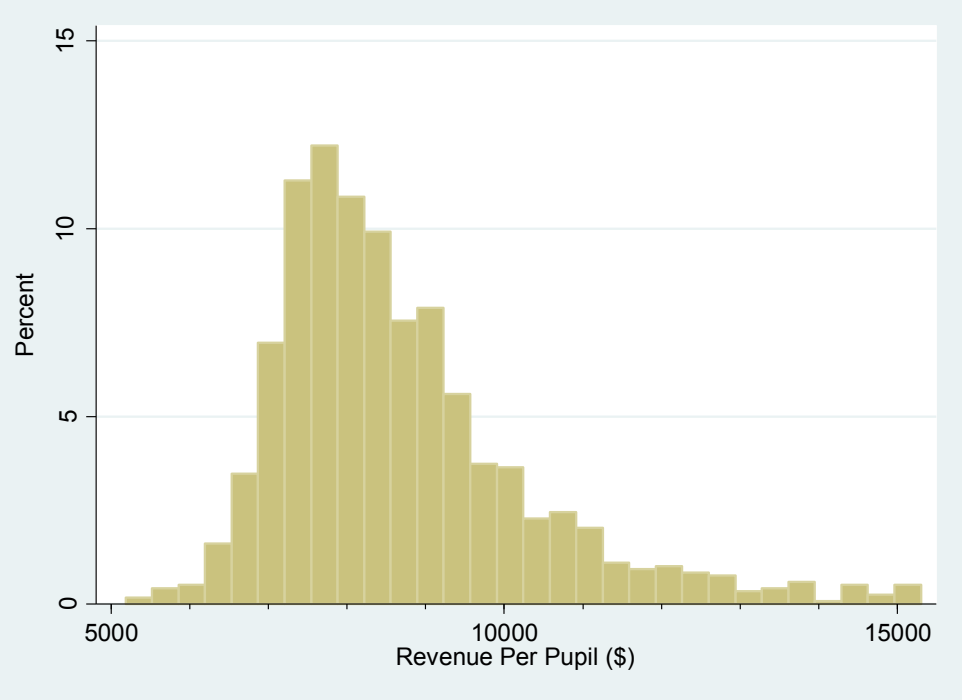

Figure 1 Histogram- Revenue Per Pupil[iv]

Method

Because we were able to obtain data on all districts in the state, we consider ourselves to be in possession of population-level data. This means that we were not working with sample data; therefore inferential methods are not needed (Gravetter & Wallnau, 2013; Johnson & Christensen, 2008). Whereas inferential methods provide best guesses of varying confidence at the characteristics of the population, which the sample data is meant to represent, our findings are the true and known contexts of school finance in Texas.

Our first research question is broadly stated and asks whether a relationship exists between race and district revenues. We begin our response to this question by determining the correlation between district revenue per pupil and the percentage of White students within a district. To represent this relationship, we use the most common measure of correlation (Gravetter & Wallnau, 2013), the Pearson product-moment correlation coefficient (Pearson, 1895; Pearson & Lee, 1903), which was weighted by total district enrollment. After determining the correlational relationship between these variables, this first research question then becomes one of probability—if there is, in fact, a difference between funding for White children and children of color, what is the likelihood that the difference is due to chance? To answer this question, we create a weighted cross-tabulation of race and per-pupil revenue, in which each student in the state is considered. In this cross-tabulation, the row variable is student race and has two categories: White students and students of color. The column variable is per-pupil revenue, in which we create five categories representing quintiles of per-pupil revenue amounts. These five categories are the ranges in funding created when all districts in the state are ordered by per-pupil revenue, from least to greatest, and separated into quintiles of equal size (225

districts)[v]. Students attending the districts within each quintile are then parsed out by race categorization to determine cell frequencies for the cross-tabulation.

In order to look for a relationship between race and per-pupil revenue in the cross-tabulation, we report the *observed* number of students in each cell, along with the number of students *expected* to be in each cell under a scenario in which race and district revenues are not related. We calculate the percentage differences between the expected and observed frequencies as a measure of disparity between these figures.

Our second research question seeks to quantify the difference in average revenue per White pupil and average revenue per pupil of color. We determine this difference by subtracting two separate, weighted means[vi]: one representing all White students and the revenue per pupil afforded to the districts they are enrolled in, and another representing all students of color. We then use this difference to determine the effect of race on revenue per pupil. We present Cohen's d (Cohen, 1988) as our measure of effect size, which is calculated by dividing the aforementioned difference by the pooled standard deviation of revenue per pupil.

The methodology for our third and final research question builds upon the findings from our first and second research question. To quantify the gap in funding between White students and students of color at the state level, we multiply the difference between the weighted means by the total number of children of color in the state. Additionally, we explore district-specific revenues to provide examples of the gaps experienced by individual districts.

Analysis

Our initial review of the data simply involved determining whether there was in fact any difference between funding for White children and children of color in Texas. A more detailed explanation of this disparity and our subsequent explorations is offered in the following sections.

Research Question 1

Our analysis found a clear relationship between race and funding. The weighted correlation between district revenue per pupil and the percentage of White students within a district was positive (ρ=0.256). This means that that higher proportions of White students within a district command larger per-pupil revenues from the Foundation School Program.

Table 2 displays the cross-tabulation of revenue per pupil and student race. For each of the 10 core cells, the top figure is the observed frequency, measured in individual students. The next number is the expected frequency. The bottom number in each cell is the percent difference the observed frequency presents compared to the expected frequency.

Consider the cell at the intersection of the "< $7,429.00" column and the "White Students" row. Across the State of Texas, there are 434,895 White students enrolled in districts that receive less than $7,429.00 in revenue per pupil, the lowest category of revenue per pupil. Under a scenario in which there is no relationship between race and revenue per pupil, we would have expected a larger count of 508,966 White students in this cell. The inverse is true for the cell just below, where there were more students of color observed than were expected in this lowest payout category. In sum, White students are overrepresented in the wealthiest districts and underrepresented in the poorest.

Table 2[vii]
Cross-Tabulation of District Revenue Per Pupil and Student Race

		Less than $7,429	$7,429 to $8,042	$8,043 to $8,748	$8,749 to $9,948	Greater than $9,948
White Students	observed	434,895	425,291	442,517	151,569	65,965
	expected	508,966	510,087	370,038	91,484	39,662
	% difference	-14.55%	-16.62%	+19.59%	+65.68%	+66.32%
Students of Color	observed	1,231,610	1,244,883	769,098	147,978	63,899
	expected	1,157,539	1,160,088	841,577	208,063	90,202
	% difference	+6.40%	+7.31%	-8.61%	-28.88%	-29.16%
Total		1,666,505	1,670,174	1,211,615	299,547	129,864

Were Table 2 to have been constructed from sample data, a chi-square test (an inferential method) could determine the statistical significance of any disparities between observed and expected frequencies. Since, and as previously mentioned, the present study utilizes population data, the percent differences reported above, help to capture the known and substantial underrepresentation of White students in the two lowest revenue quintiles (each having roughly 15% fewer White students than expected), along with their striking overrepresentation in the two highest revenue quintiles (each having greater than 65% more White students than expected). These percent differences correspond with an overrepresentation of students of color in the two lowest revenue quintiles (roughly 7% more students of color than expected in each), along with a troubling underrepresentation in the two highest revenue quintiles (roughly 29% fewer students than expected). These percentage differences support our conclusion that race and the Foundation School Program revenues are associated in some way.

Research Question 2

As we stated above, the statewide, weighted mean for per-pupil revenue is $7,815.53. Notice this figure is substantially less than the $9,143.00 mean value for revenue per pupil reported in the data section. Recall that in reporting the mean of revenue per pupil in the data section, each of the 1,226 districts in the state was represented equally. However here, in calculating a weighted mean, each district's revenue per pupil figure is weighted by the total enrollment of that district. Because of the structure of our data, we can determine separate, statewide average revenues per White pupil and per pupil of color. Those figures are $8,031.66 and $7,720.50, respectively. This means that, on average, in the 2011-2012 school year, the State of Texas allotted $311.16 more in school funding for every White student than it allotted for every student of color.

Research Question 3

Our third research question cuts to the quick in terms of funding analysis and Title VI. It asks how big the gap is between funding for White students and students of color. There are two levels at which this can be measured. One is across the entire state—i.e. how disparate is the

impact of the Texas funding system in its treatment of White students and students of color. The second is by comparing comparable districts to one another. As we will elaborate below, the first measure will be one that would be instructive in pursuit of a Title VI claim against the overall Texas funding structure. The second level of analysis would be useful for individual districts that may wish to pursue a Title VI claim with OCR. One point is worthy note by way preamble to these two analyses.

Greater than half of the state's student population is Latino. These same students comprise the overwhelming majority of the over 800,000 students in the state classified as limited English proficient (LEP). Educating English language learners is more expensive than educating native-English speakers (Jimenez-Castellanos & Topper, 2012). Further, children of color disproportionately qualify for special programs such as bilingual education and English as a second language learner (ELL) instruction (Office of English Language Acquisition, 2002), and are overrepresented in special education (Ferri & Connor, 2005; Ford, 2013; Milner, 2010; Obiakor & Utley, 2004; Office for Civil Rights, 2006). The Foundation School Program provides districts with additional allotments, based on their enrollment of identified students, to support special education and bilingual education (Texas Education Agency, 2013). Thus, given the "special conditions" that students of color bring with them, which in turn yield more funds from the Foundation School Program, the racial gap in funding that we have uncovered is all that more surprising. The fact that, in spite of attempts by the state to compensate financially for these special needs, children of color still receive less funding than White children is indicative of a serious problem.

Statewide Disparity

The effect size of student race on revenue per pupil is reflected by a Cohen's d value of 0.29. Traditional classifications of effect sizes rate this effect as small to medium (Cohen, 1988). However, some researchers argue that substantive interpretations of effect size carry far more weight than traditional classifications (Lenth, 2001; Maher, Markey, & Ebert-May, 2013). Even Cohen himself (1988) reminds us that interpretation must be made in context. Consider for example, the overall state-wide change in Foundation School Program payout that would be required if all students of color in the State of Texas drew to their districts an additional $311.16 to make up for this funding deficit associated with race. There are 3,457,468 students of color in Texas – when this figure is multiplied by $311.16, the resultant change in expenditure of the Foundation School Program would be an additional $1,075,825,743 – or well over one billion dollars. In other words, for students of color to receive the same funding as White students, the state would have to spend an additional $1 billion on students of color. To put that into perspective, that figure falls right in between the *total annual revenues* of Dallas Independent School District (ISD) and Cypress-Fairbanks ISD, the state's second and third largest school districts, each of which has an enrollment of well over 100,000 children (157,085 and 107,600 students enrolled in 2011-2012, respectively). Texas' statewide funding disparity for students of color is clearly significant.

District-Level Disparity

One of the more common examples cited by plaintiffs in the current legal wrangling around the Foundation School Program is the comparison between Fort Worth ISD and Austin

ISD. Both districts are similarly situated in that they are both large, urban districts with comparable enrollment. Each district enrolls roughly 80,000 students and is reflected similarly in the Foundation School Program's weighting system that accounts for a variety of district and student characteristics in determining final payouts. In 2011-2012, Austin ISD received $8,603 revenue per pupil, while Forth Worth received $7,382. This $1,221 (14.2%) per student disparity came about despite similar local tax rates. Austin ISD's enrollment is 75.6% students of color, while Fort Worth ISD's is 86.3%.

Another example of Texas' intra-district racial disparity is found comparing West Rusk ISD and Arp ISD. Both are rural districts located in East Texas and are located only 8 miles apart. They have very similar enrollment and district characteristics. They also have similar local tax rates. Yet, Arp ISD earns $9,189 per pupil while West Rusk ISD gets $8,508. From West Rusk's perspective, that is a real dollar shortfall of $681 (7.5%) per student, annually. Arp ISD's enrollment is 71.6% White while West Rusk ISD's is 58.4% White.

Finally, Northwest ISD, an affluent suburban district outside of Forth Worth is 68.2% White. Edgewood ISD in urban San Antonio is 95.5% students of color. While total enrollment is not the same, the Foundation School Program weighting system makes them comparable. Despite this comparability, Edgewood ISD's revenue per pupil is just $7,674 compared to Northwest ISD's $9,611. This is a real difference of $1,937 (20.1%) per student, despite similar local tax collection rates. We provide specific district comparisons to demonstrate the significant gaps between comparable districts. These disparities could form the basis for Title VI claims.

Discussion

Title VI Overview

As previously discussed, the United States Supreme Court has held that there is no federally protected right to education. Congress, however, has enacted legislation to create a framework via which discrimination by states may be eradicated in many areas, including education. The Civil Rights Act of 1964 is the foundation of that legislation—and Title VI is a critical part of the framework.

Title VI was enacted in 1964 in recognition of the fact that segregation was still in existence a decade after *Brown v. Board*. The Congressional aim behind its enactment was the creation of a legal right, "not by judicial fiat but by a historic legislative enactment" and based on the idea that "racial discrimination in federally funded schools and other institutions could best be eliminated not by litigation but buy the administrative action of agencies enforcing a federal law" (Halpern, 1995). The statute provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Civil Rights Act of 1964)

The power underlying Title VI was stated succinctly by the Supreme Court in *Lau v. Nichols* (1974): "The Federal Government had the power to fix the terms on which its money allotments to the States shall be disbursed" (p. 569).

Thus, although there is no federal right to education—there is a federally enforceable right to non-discrimination in educational programs that receive federal funds. This is the crux

of Title VI. As a condition of receiving federal funds, states must agree to comply with Title VI's proscriptions on discrimination. If they fail to comply, federal funds can be withdrawn.

There are two primary ways in which a state receiving federal funds can violate Title VI: intentional discrimination (see *Guardians*, 1983; *Alexander v. Choate*, 1985) and disparate impact (see *Guardians*, 463 U.S. 582; *Alexander v. Choate*, 1985; *Elston v. Talladega County Board of Education*, 1993).

Intentional discrimination. The intentional discrimination proscription of Title VI is relatively straightforward. A state violates Title VI if it intentionally discriminates on the basis of a protected class in administering programs involving federal funds (*Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 1977; *Washington v. Davis*, 1976). There is no requirement of ill will or evil motive; the simple fact that intent to treat a protected category differently is shown can constitute intentional discrimination (*Williams v. City of Dothan*, Ala., 1984; *Elston*, 1993). Discriminatory intent can be proven by evidence of a number of factors such as: "substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision" (Department of Justice, 1998, sec. VIII-A). The Supreme Court has held that the protections of Title VI are coextensive with those of the Equal Protection Clause (*Alexander v. Choate*, 1985; *Elston*, 1993, note 11).

Disparate impact. Disparate impact suggests a racially neutral policy may violate Title VI if its colorblind application results in a disparity of impact along racial (or other protected class) grounds. Thus, as its name implies, disparate impact analysis focuses on the results of a given policy rather than the intent behind its design or application (*Lau v. Nichols*, 1974).

Title VI disparate impact claims utilize an analysis similar to that under Title VII (*Young v. Montgomery County (AL) Board of Education*, 1996). To prevail on a disparate impact claim, a complainant must show that a recipient of federal funds implements a neutral procedure or process that has a disparate impact on a protected class (*Larry P. v. Riles*, 1984; *Elston*, 1993 (citing *Georgia State Conference,* 1985). If a *prima facie* showing of disparate impact can be made, then it is up to the state to show a "substantial legitimate justification" for the practice (*Georgia State Conference*, 1985, p. 1417). This requires showing that the procedure was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission" (*Elston*, 1993, p. 1413). If the state carries that burden, then the complainant can still prevail if she can show a less discriminatory alternative is available (*McDonnell Douglas v. Green*, 1973).

Ironically, much of the activity involving Title VI enforcement has been via suits in federal courts (although, as noted above, Title VI was intended to create administrative remedies for Civil Rights violations). Further litigation, however, was foreclosed by the United States Supreme Court's decision in *Alexander v. Sandoval* (2001), which held that Title VI did not provide a private right of action for disparate impact claims. Thus, disparate impact claims may now be brought only by filing a complaint with the Office for Civil Rights.

Disparate impact by the numbers. What level of disparity is needed to state a claim under disparate impact theory? While there is no cut and dry answer, we analyze three disparate impact cases in order provide a frame of reference for analyzing disparity.

Lau v. Nichols (1974) set the stage for disparate impact litigation under Title VI. The 1974 case involved claims by non-English-speaking Chinese students who claimed that they

received unequal education opportunities based on their race or national origin in violation of Title VI because they did not receive English language courses (p. 563).

As of September 1969, San Francisco Unified School District (SFUSD) had approximately 100,000 students. Of those, 16,574 were Chinese (*Lau v. Nichols*, 1973). Two classes of non-English-speaking Chinese students were represented in the case. The first class was made up of 1,790 students of the 2,856 in the SFUSD that needed special instruction in English. The second class of 1,066 students received some ESL support, 633 at one hour per day, 433 at six hours per day. Thus, at issue was the English language education of approximately 2,300 Chinese students (out of a total of 100,000 students) who did not receive "full" English learning support.

The Court noted that SFUSD received federal financial assistance (*Lau v. Nichols*, 1974). As a result, it was contractually obligated to comply with Title VI and any regulations issued under its auspices. This included programs that have the effect of discriminating on the basis of race or national origin, but not the intent. Based on the numbers presented, the Court found that

> It is obvious that the Chinese speaking minority receive fewer benefits than the English speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all the earmarks of the discrimination banned by the regulations (p. 568).

The Court held that SFUSD was in violation of Title VI.

Although the Court did not do the math in this way, understanding the figures is instructive:

Table 3[viii]
San Francisco Unified School District Enrollment Figures

	Total Students		Chinese		
		Total	No Eng. Support	Some Eng. Support	Full Eng. Support
Students	100,000	2,856	1,790	633	433
Percent of Total	100%	2.86%	1.79%	0.63%	0.43%

As indicated in Table 3, SFUSD failed to provide full English learning support for 2,423 of its students – approximately 2.4% of the total student population. Disparate treatment of only 2.4% of the student population on the basis of race was deemed sufficient by the Supreme Court to violate Title VI.

The concurring opinion by Justice Stewart went further. He states that the children with whom the Court was actually concerned "number about 1,800" (*Lau v. Nichols*, 1974, p. 572), the class of children that received no English support at all. Regarding that 1.8% of the total student population, he argued "this is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom" (p. 572). Justice Stewart stated that his concurrence was written to emphasize that "numbers are at the heart of this case" and that while one or a few students might not merit the same result, 1,800 (or 1.8% of the student population) did (p. 572).

In *Larry P. v. Riles* (1979/1984), the Ninth Circuit reviewed Title VI claims of disparate impact in the enrollment of Black children in educational programs for the educable mentally retarded. In analyzing disparity of impact, the court looked to statistical evidence. The court

noted that in the 1968-69 school year, although only 9% of children in the state school population were Black, Black children accounted for 27% of the educable mentally retarded (*Larry P. v. Riles*, 1979/1984). The court also cited with approval evidence addressing the statistical probability of these disparities arising by chance. Again, by way of example, the court noted a *less than one in a million probability* that over-enrollment of Black children would have resulted from a color-blind system. The district court found persuasive that over-enrollment of Black children in all but three school districts was statistically significant.

Finally, *Campaign for Fiscal Equity, Inc. v. State* (1995) addressed a claim of disparate impact under Title VI. In that case,

> Plaintiffs complain that 74% of the State's minority student population attend City Schools; that minorities make up 81% of the City's public school enrollment as compared to 17% of school enrollment outside the City; and that the City's predominantly minority students receive 12% less State aid per pupil ($3,000) than the State-wide average ($3,400) (p. 670).

The Court of Appeals of New York (that state's highest court) held that Plaintiff's had stated a claim of disparate impact.

Legal Analysis

In this article, we do not focus on the intentional discrimination prohibition of Title VI, rather we address disparate impact analysis. There are, we believe, two levels at which this analysis can be conducted: (1) the claim could be made the Texas school funding system in its entirety violates Title VI; and (2) individual districts could argue that the funding system violates Title VI as to them.

The Texas funding system statewide. In order to state a claim of disparate impact, as Justice Stewart pointed out, the question is one of numbers. How much disparity is enough to state a claim under Title VI? A few instructive Title VI cases are cited above. Beyond those, Title VII analysis is instructive and tends in two directions. There is a rule of thumb approach that has been used in Title VII claims—practical significance, the 4/5^{ths} rule, etc. Other cases have relied on statistical significance. And some rely on a combination of the two—both practical significance and statistical significance. A recent survey of Title VII cases found that over 50% of court cases rely on both measures simultaneously in analyzing adverse impact (Clavette, 2010).

Practical significance. From a practical perspective, at a statewide level, the overall disparity in school funding between Whites students and students of color is 3.87%. In other words, White students, on average, receive about 4% more funding than do students of color. What does this mean to an average school district that primarily serves students of color? Taking the average district size of 4,060 students, equalizing funding to a district that primarily serves students of color would require an additional $1,263,346. For Laredo ISD, which is made up of 99.7% students of color, comparable funding to the White average would mean an additional $7,679,428 in funding. Yes, this only represents 4% of that district's current funding, but what are the practical impacts of an additional $7.6 million in the budget? Can that kind of money make a difference to the education of students of color? Would the children of Laredo ISD be better off, have a better educational opportunity, if administrators had an additional $7.6 million

to deploy for their benefit? The practical impact of this level of additional funding for Laredo and other districts with large populations of students of color would be significant.

Statewide funding conclusion. From a practical perspective, the Texas Funding System treats students of color differently to the tune of over $1 billion. As we point out above, students of color are underfunded by this amount *despite* the fact that the Texas Funding System includes programs designed to provide higher levels of funding to populations (such as English language learners) that are overrepresented by students of color. Thus, despite the state's attempt to design a system where funds are allocated to compensate for special needs of students of color, White students still receive significantly greater funding than students of color. The impact is disparate, not just practically, but statistically. There is virtually zero probability that the association between race and funding is due to chance. On either basis, a disparate impact exists.

Individual districts. The difference in funding between districts within the state is greater than what we find at the state level. We have provided several examples of districts that appear similarly situated, yet have significantly larger funding gaps. Due to these glaring disparities, we suggest that promising opportunities exist for individual districts to register Title VI complainants.

Conclusion

While many have touted Texas' educational achievements as "The Texas Miracle," serious questions exist regarding the equity of school funding in Texas. Texas has struggled for decades to design and implement a school funding model that is both efficient and equitable. The state's failure to achieve this objective has been highlighted repeatedly in cases before the Texas Supreme Court in which the state funding system has been held unconstitutional. The school funding issue will be addressed by the Texas Legislature yet again in the upcoming 2015 session, though few hold out real hope for either an equitable outcome or a final resolution of the Texas school funding problem.

The real Texas Miracle is that, sixty years after *Brown v. Board of Education*, Texas still operates public school funding under a system that discriminates on the basis of race. Given that the state government has had sixty years to resolve the problem, and has repeatedly and consistently failed, what more can be done?

While education is a local issue, and one could argue should be best managed locally, exceptions arise under certain circumstances. One example would be in situations where local administrators are unable (or unwilling) to provide an equitable system for all citizens, regardless of race. A second, and more compelling, circumstance would be in situations where a state accepts federal funding—and the non-discrimination requirements that such funding entails—yet continues to operate a school funding scheme that discriminates on the basis of race.

In the State of Texas, both of these circumstances exist. Given the state's long history of racial discrimination in education in general and school funding specifically, and the evidence presented herein of ongoing differences in funding levels based on race, perhaps the time has come for appeal to a higher authority. Perhaps federal involvement and the threat of withdrawal of federal funding is required to finally achieve equity for students of color in Texas.

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[i] The first Texas law allowing for bi-lingual education was passed in 1969 and paved the way for other states to follow suit.

[ii] Here we provide only a few examples of situations that demonstrate a strong potential for success, and provide a proposed analysis for complainants.

[iii] This table refers to TEA data for the 2011-2012 school-year.

[iv] This table refers to TEA data for the 2011-2012 school-year.

[v] Because there were 1,226 districts in the 2011-2012 school year, a number not divisible by five, the fifth and final quintile contains students from one additional school district.

[vi] A *weighted* mean is one in which every individual student is represented in the calculation. The term weighted in this occurrence should not be confused with weighted average daily attendance – a measure of district enrollment used in various formulas within the Foundation School Program.

[vii] This table refers to TEA data for the 2011-2012 school-year.

[viii] Data from the *Lau v. Nichols*, 1974 case